

COUNCIL MEMBER TRAINING

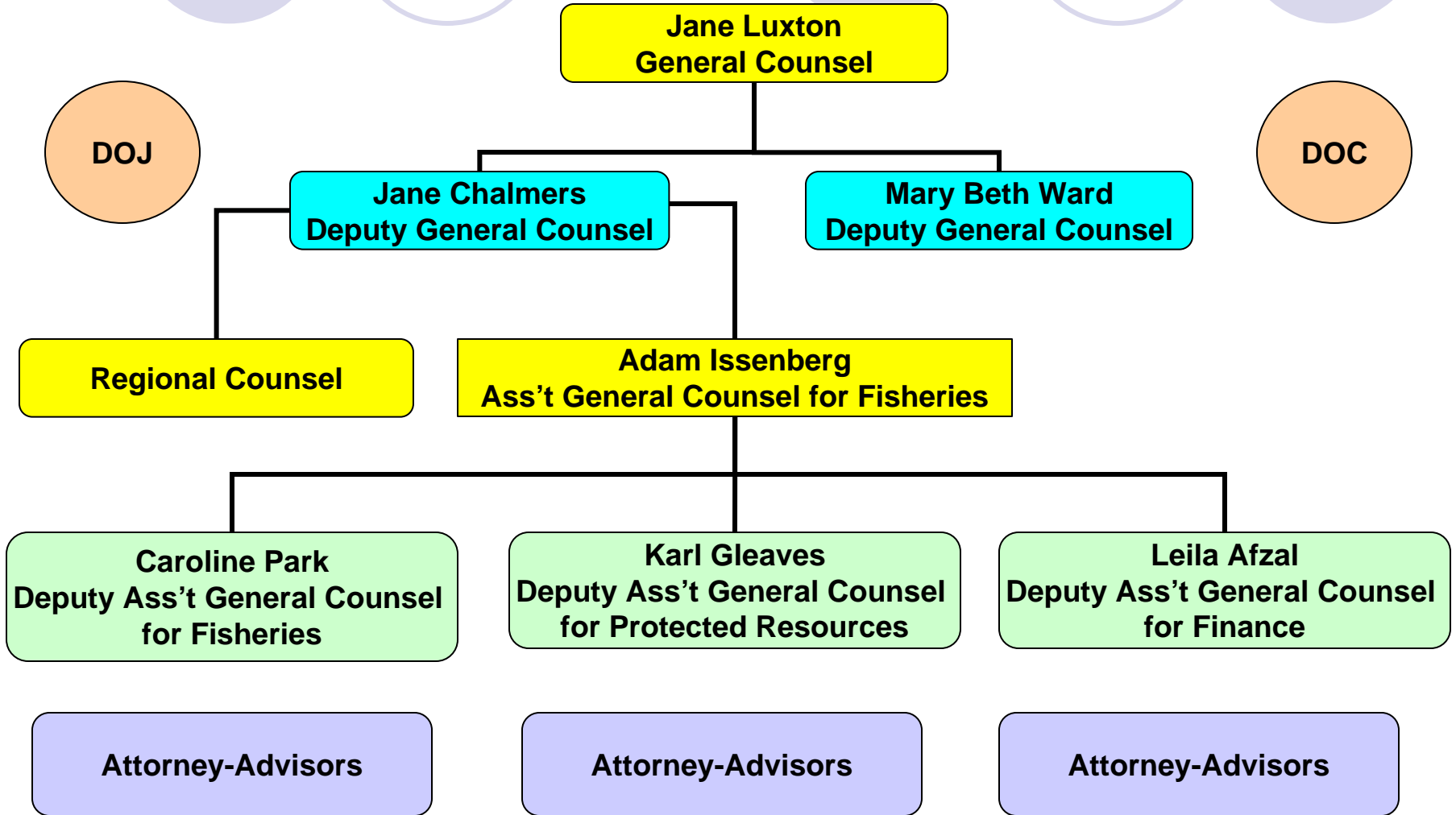
October 23, 2007

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NOAA General Counsel

NOAA General Counsel Organization



NOAA GENERAL COUNSEL

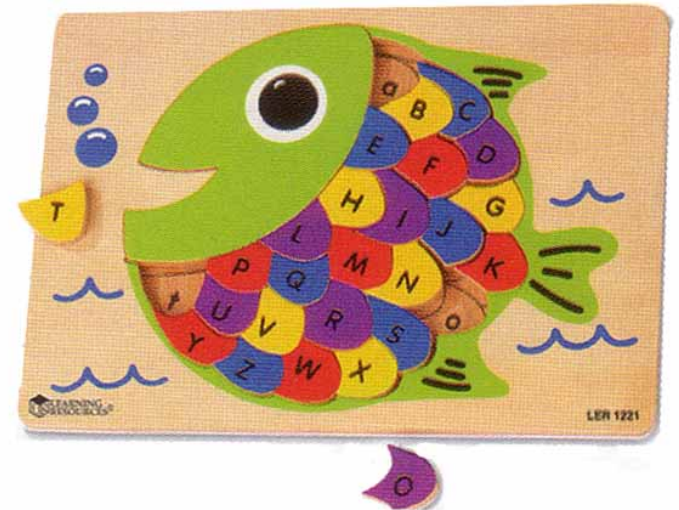
⌄ Relationship to Fishery Management Councils

- Councils May Not Sue or Be Sued
- NOAA GC Represents Agency
- NOAA GC regional counsel provides legal guidance at Council Meetings
- NOAA GCF advises HQ and provides national coordination

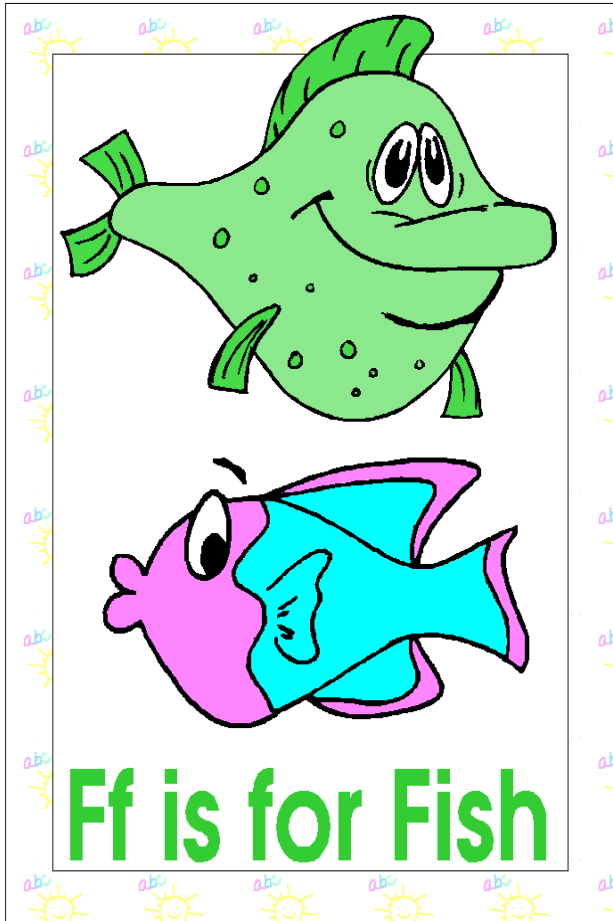


STATUTORY REQUIREMENTS APPLICABLE TO FISHERIES MANAGEMENT

- Magnuson-Stevens Act
- National Environmental Policy Act
- Endangered Species Act
- Marine Mammal Protection Act
- Regulatory Flexibility Act
- Regulatory Impact Review
- Administrative Procedure Act
- Coastal Zone Management Act
- Information Quality Act
- National Marine Sanctuaries Act



MAGNUSON-STEVENS ACT (MSA)



- Primary Authority for Fisheries Management
- FMPs and Regulations must be:
“Consistent with Other Applicable Law”



Managing Multiple Mandates

- Different Congressional Purposes
- FMPs must be consistent with other applicable law
- Documentation for other statutes helps build the record

Regulatory Flexibility Act (RFA) and Executive Order 12866 (RIR)

- RFA

- Consider economic impacts on small entities
- Procedural statute
- Requires consideration of alternatives (FRFA)

- RIR

- Applies to “significant” actions
- Prepare cost-benefit analysis, consider alternatives
- OMB review



Administrative Procedure Act (APA)

- Sets Standards and Procedures for Judicial Review of Federal Agency Actions
 - Applies to Review of MSA Regulations
- Establishes “Arbitrary and Capricious” Standard for Judicial Review
 - Gives “Deference” to Agency Decisions
 - Provides for Court review “on the Record”

LITIGATION





LITIGATION

- Magnuson-Stevens Act
 - final agency actions can be challenged within 30 days
 - no injunctions
 - expedited review
- Other statutes
 - judicial review under APA

Judicial Review: 3 Key Concepts

1. Chevron two-step process
2. “Arbitrary and Capricious”
Standard of Review (APA)
-> *“Arbitrary, Capricious, an Abuse of Discretion,
or Otherwise Not in Accordance with Law”* (5
U.S.C. § 706(2)(a))
3. Review on the record

1. Chevron “Two Step” Process

Step 1: Has Congress spoken directly to the precise question at issue?

YES → Give effect to Congressional Intent!

NO → Go to:

Step 2: Is the agency’s answer based on a permissible construction of the statute?

From Chevron, Inc. v. Natural Resources Defense Council (U.S. Supreme Ct. 1984)



Natural Resources Defense Council v. NMFS (9th Circuit, 2005)

⌚ **Challenge to annual quota for
dark-blotched rockfish**

**Issue: Whether NMFS could
take into account the “needs
of fishing communities” when
setting a quota for a species
with a rebuilding period
longer than ten years.**

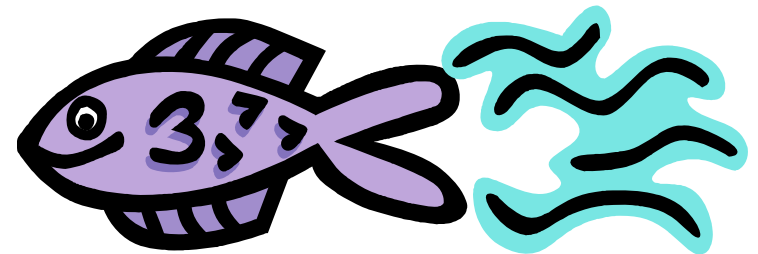


Natural Resources Defense Council v. NMFS (9th Circuit, 2005)

Rebuilding plans must specify a time period for ...
rebuilding the fishery that shall –

- (i) Be *as short as possible* taking into account the status and biology of any overfished stock of fish, the *needs of fishing communities*, ... and the interaction of the overfished stock of fish within the marine ecosystem; and
- (ii) Not exceed ten years, except in cases where the biology of the stock of fish [or] other environmental conditions dictate otherwise.

MSA Section 304(e)(4).



North Carolina Fisheries Ass'n v. Gutierrez (D.C. Circuit, pending)

⚖ **Challenge to S. Atlantic Snapper-Grouper FMP amendment**

Issue: Whether an FMP amendment may take measures to end overfishing without providing a rebuilding plan for a stock that is both subject to overfishing and overfished.



North Carolina Fisheries Ass'n v.
Gutierrez (D.C. Circuit, pending)

Within one [now two] year after identification under paragraph (1) or notification under paragraphs (2) or (7), the appropriate Council shall prepare [and implement] a FMP, plan amendment, or regulations for the fishery –

(A) *To end overfishing [immediately] in the fishery and to rebuild the affected stocks of fish;*

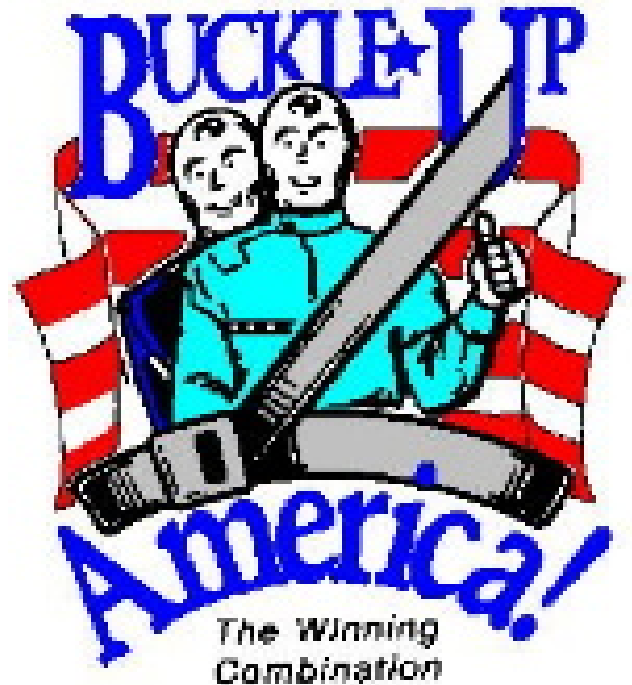
MSA Section 304(e)(4).



2. “*Arbitrary and capricious*”

Motor Vehicles Manufacturers Ass’n v.
State Farm Mutual Automobile
Insurance Co. (U.S. Supreme Ct. 1983):

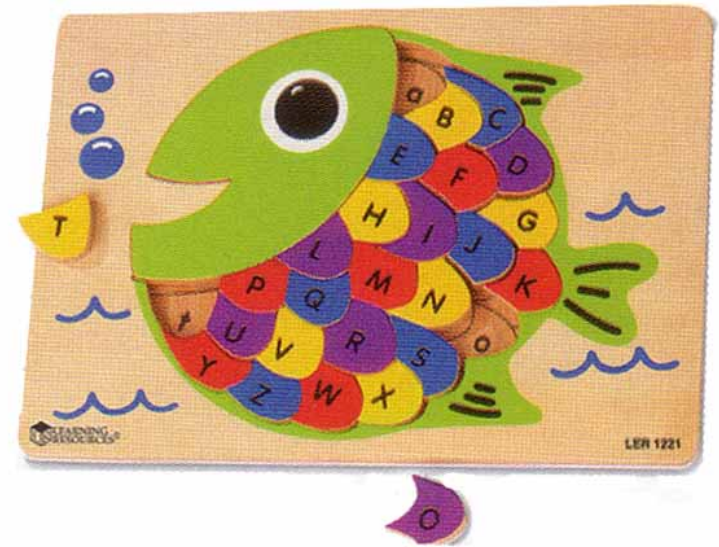
- relied on factors which Congress had not intended agency to consider
- entirely failed to consider an important aspect of the problem
- offered an explanation for its decision that runs counter to the evidence before the agency
- is so implausible that it could not be ascribed to a difference in view or the product of agency expertise



Natural Resources Defense Council v. Daley (D.C. Circuit, 2000)

⚖ **Challenge to annual quota for summer flounder**

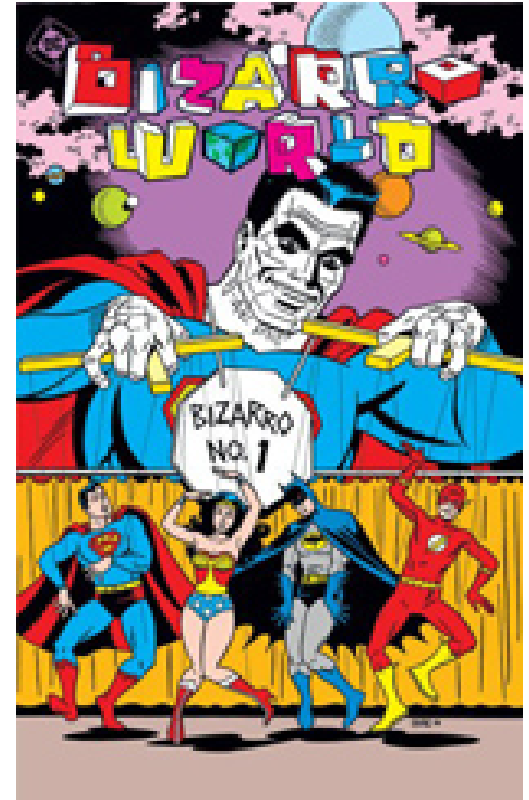
Issue: Whether quota that had an 18 % likelihood of meeting target fishing mortality rate was arbitrary and capricious.



Natural Resources Defense Council v. Daley (D.C. Circuit, 2000)

“Only in Superman Comics’ Bizarro World, where reality is turned upside down, could the Service conclude that a measure that is at least four times as likely to fail as to succeed offers a ‘fairly high level of confidence.’”

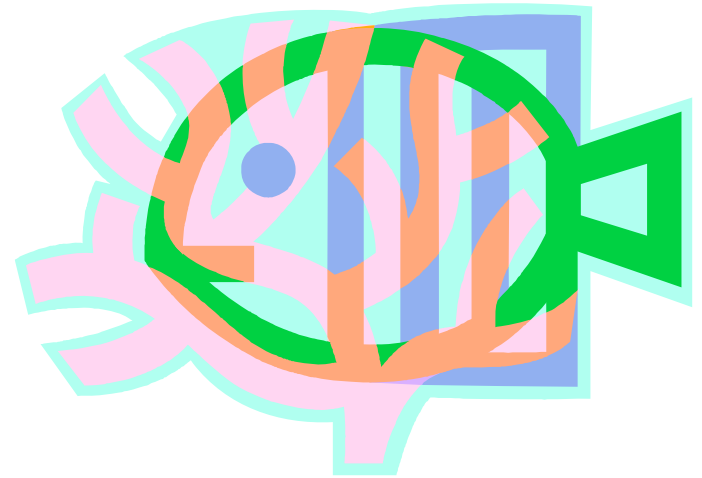
Court held: The quota must have, at the very least, a 50% chance of attaining the target F.



Legacy Fishing Co. v. Gutierrez (D.D.C. Circuit, 2007)

⚖ **Challenge to FMP
Amendment for BSAI
groundfish**

**Issue: Whether groundfish
retention standard was
arbitrary and capricious in the
manner in which it balanced
economic costs and
conservation benefits.**

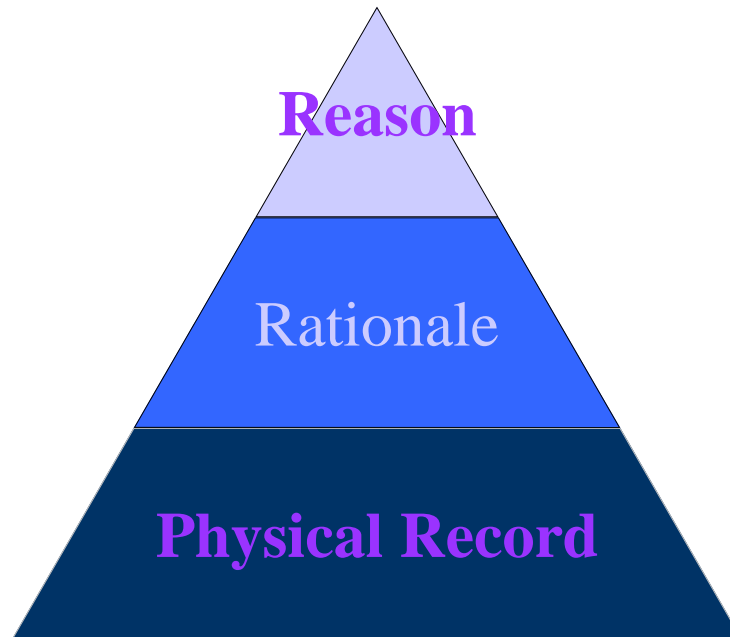


3. Review on the Record

- Document Regulatory Process
 - Applicable Statutory Process (APA Notice and Comment, MSA, NEPA, RFA, IQA, CZMA, ESA, etc.)
 - Executive Orders (E.O. 12866, E.O. 13132)
- Explain/Rationally Support Decision
 - Met Legal Standards
 - Discuss “Best Available Science” When Required
 - Consideration of Opposing Points of View
 - Explain Preferred Choice



The 3 “Rs” of Agency Decision-Making



The Reason for the Agency Action

- Impetus for Decision-Making Process
 - Statutory Responsibilities
 - Programmatic Goals
- Mandatory vs. Discretionary Actions

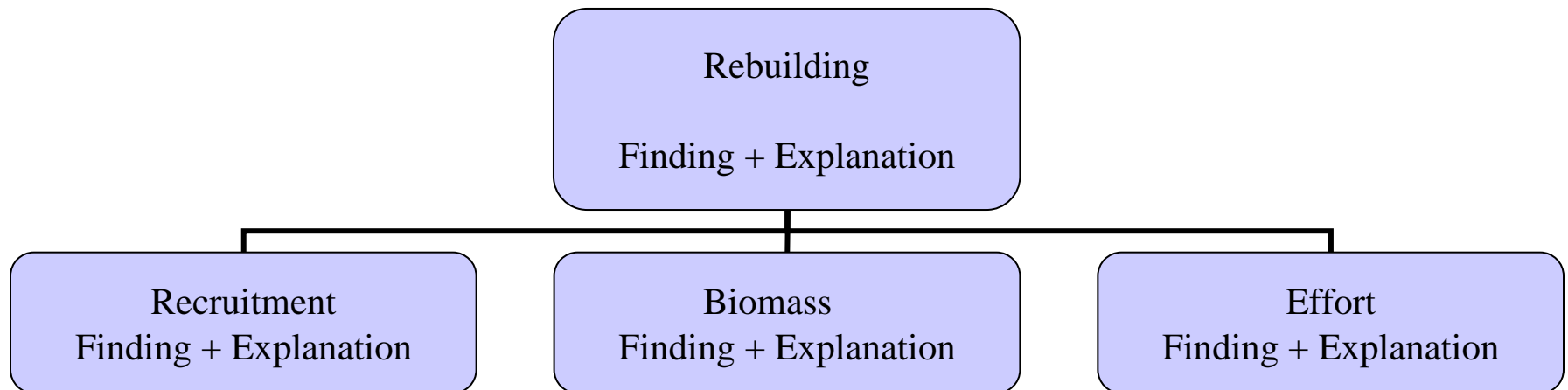
The Rationale Supporting the Reason

Why Does an Agency Need a Rationale?

- A Court Shall Hold Unlawful and Set Aside Agency Action... Found to be
...Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law (5 U.S.C. § 706(2)(a))
- Consider the Relevant Factors

The Rationale Supporting the Reason

- Finding + Explanation = Rationale
- Need Rationale for Each Major Conclusion and Each Subordinate Relevant Factor



The Rationale Supporting the Decision: *The Relevant Factors*

- Public Comments
- Public Testimony
- Scientific Data
- Peer Review
- Correspondence and Meetings
- Attorneys

The Physical Record Supporting the Rationale Supporting the Reason

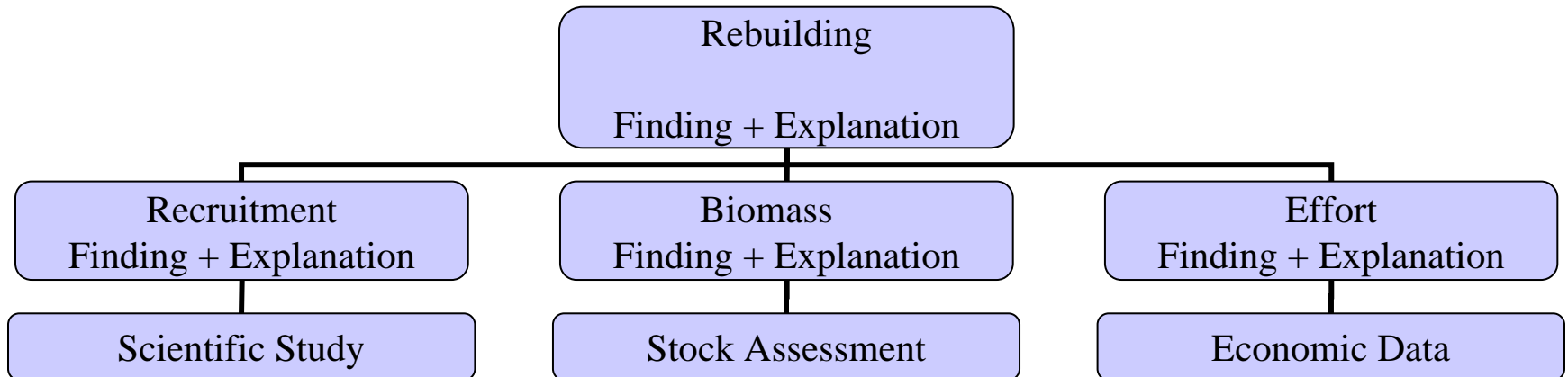
- The Court Shall Review the Whole Record or Those Parts of It Cited by a Party.
Administrative Procedure Act, 5 U.S.C. §706.
- Judicial Review is limited to “the record the agency presents to the reviewing court.”
Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).

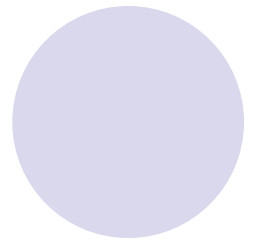
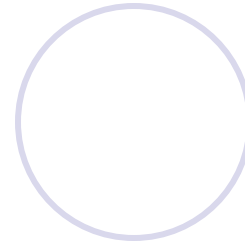
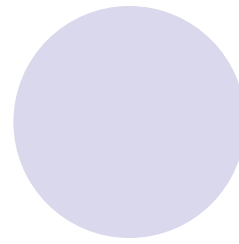
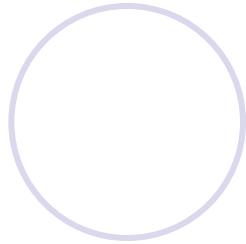
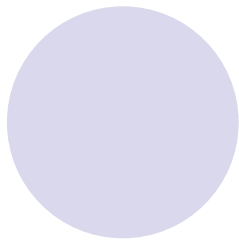
Elements of the Physical Record

- FINAL DECISION DOCUMENT
- FMPs, Amendments, Committee Reports, SSC Reports
- ARs from earlier decisions, if relevant
- Policies, guidelines, directives manuals
- Reference documents –
- Public Input and Response –
 - Summaries of meetings with public
 - Public Comment
 - Transcripts of Council Meetings
- Any Other Materials that Contain Relevant Facts

Building The Physical Record

- Administrative Record Should Support the Rationale for Every Major Conclusion and Each Subordinate Relevant Factor





What are the Consequences of Litigation?

Litigation – Our Record

- NAPA Report: Managing Fisheries By Default (2002)
 - Reported a 50% litigation success rate for MSA cases over previous five years
- 2004 – 91% Success in Fisheries Cases
- 2005 – 89% Success in Fisheries Cases
- 2006 – 94 % Success in Fisheries Cases

Any Questions???

